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17 AT OAKLAND dba CHILDREN'S HOSPITAL
18 OF OAKLAND

19 UNITED STATES OF AMERICA
20
21 BEFORE THE NATIONAL LABOR RELATIONS BOARD
22

23 CHILDREN'S HOSPITAL & RESEARCH
24 CENTER AT OAKLAND dba CHILDREN'S
25 HOSPITAL OF OAKLAND

26 Respondent,

27 And

28 SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS-
WEST

Charging Party.

Case No.: 32-CA-086106

**RESPONDENT'S STATEMENT OF
POSITION FOLLOWING REMAND FROM
D.C. CIRCUIT COURT OF APPEALS**

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RESPONDENT'S STATEMENT OF POSITION
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Pursuant to the instructions of the National Labor Relations Board's (the "NLRB" or the "Board") Associate Executive Secretary provided by letter dated October 2, 2015, and Rule 102.46(j) of the Board's Rules and Regulations, Respondent Children's Hospital & Research Center At Oakland ("Children's Hospital" or "Respondent") submits this Statement of Position following the July 7, 2015, decision of D.C. Circuit Court of Appeals ("D.C. Circuit") to grant Children's Hospital's petition for review, to deny enforcement of the Board's Order dated February 28, 2014, reported at 360 N.L.R.B. No. 56 (the "Order"), and to remand this matter to the Board.

I. SUMMARY OF POSITION

The D.C. Circuit's opinion remanding this case, the express words of the National Labor Relations Act (the "Act"), and the prior decisions of the federal courts all point to the same conclusion: that Children's Hospital had no duty to arbitrate with the SEIU, a decertified and replaced union, and did not commit an unfair labor practice ("ULP") by refusing to so arbitrate.

Section 9(a) of the Act – which requires an employer to bargain (and thus arbitrate) only with the unit's exclusive representative – controls this case. As the D.C. Circuit noted, Section 8(a)(5)'s requirement that an employer collectively bargain (and thus arbitrate) with a union is, under the express language of the statute, "*subject to*" – i.e., subordinate to and controlled by – Section 9(a) and the exclusive-representation principle it codifies. *Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB*, 793 F.3d 56, 57 (D.C. Cir. 2015) [hereinafter, "*Children's Hosp. v. NLRB*"] (quoting 29 U.S.C. § 158(a)(5)) (emphasis added). Thus, an employer, such as Children's Hospital here, cannot be held to have unlawfully failed to bargain with a union with which it **cannot** arbitrate consistent with Section 9(a).

The D.C. Circuit also made clear that the Board's existing precedents do not support a contrary result. The court stated that the Board's prior Order "discussed only section 8(a) of the Act"; that "[n]one of the precedent [the Board] cited dealt with the precise situation here: a decertified union that has been *replaced* by a new union"; and that the Board "relied on cases that did not implicate the exclusivity principle of section 9(a)." *Children's Hosp. v. NLRB*, 793 F.3d at 59 (emphasis in original). Thus, the Board's "unfinished business" precedents are inapposite and cannot

1 support either a ULP finding or an order requiring Children’s Hospital to arbitrate with SEIU.
2 Indeed, all federal courts that have addressed whether an employer must arbitrate with a union other
3 than the exclusive bargaining representative have unequivocally answered that question in the
4 negative. *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352, 358 (2d Cir. 1966); *Federation of*
5 *Union Representatives v. Unite Here*, 736 F. Supp. 2d. 790, 792-97 (S.D.N.Y. 2010) [hereinafter,
6 “*Unite Here*”]; *Children’s Hosp. & Research Ctr. Oakland v. SEIU*, No. C 12-03862 SI, 2012 U.S.
7 Dist. LEXIS 147461, at *7-10 (N.D. Cal. Oct. 12, 2012) [hereinafter, *Children’s Hosp. v. SEIU*].

8 Even if *arguendo* the express language of the Act did not dictate the controlling rule – and it
9 does – well-established labor policy precludes requiring an employer to arbitrate with a decertified
10 union that is not the unit’s exclusive representative. As the D.C. Circuit stated, “[t]he majority-rule
11 concept is today unquestionably at the center of our federal labor policy.” *Children’s Hosp. v. NLRB*,
12 793 F.3d at 57 (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)). “Obligating
13 an employer to bargain only with the majority union prevents ‘strife and deadlock’ by eliminating
14 rival factions that can make demands on the employer.” See *id.* (citing *Emporium Capwell Co. v. W.*
15 *Addition Cmty. *58 Org.*, 420 U.S. 50, 68 (1975)). Here, as the District Court that previously ruled
16 on this dispute observed, “to compel arbitration here would necessarily entangle Children’s Hospital
17 in bargaining and negotiations [with the decertified union] related to the arbitration proceeding.”
18 *Children’s Hosp. & Research Ctr. of Oakland, Inc.*, 2012 U.S. Dist. LEXIS 147461, at *8; see also
19 *McGuire*, 355 F.2d at 358 (“[A]n order [] to arbitrate might force [the employer] to commit an unfair
20 labor practice by ‘bargaining’ with a minority union when a majority union is in existence.”).

21 These concerns are not merely abstract. The language in the prior collective bargaining
22 agreement (CBA) at issue in the three underlying grievances is **identical** to the language in Children’s
23 Hospital’s current CBA with the newly certified union, NUHW. Under well-established doctrines of
24 arbitral precedent and issue preclusion, any award rendered in an arbitration proceeding with SEIU
25 will likely directly affect the interpretation and application of identical language in the current CBA
26 with NUHW. Therefore, contrary to the Board’s and SEIU’s arguments before the D.C. Circuit,
27 compelled arbitrations here would **not** merely involve only the prior (and now defunct) bargaining

1 relationship, would **not** implicate only the prior (and now superseded) collective bargaining
2 agreement (“CBA”), and **would** involve *de facto* bargaining over the current CBA’s terms.

3 Significantly, a decision by the Board correctly holding that Section 9(a) precludes arbitration
4 with a decertified and replaced union would not deprive the grievants of a remedy. Before the D.C.
5 Circuit, the Board conceded that both ULP charges and Section 301 suits would provide an
6 alternative avenue for relief. Tolling rules would permit any grievant who cannot arbitrate due to a
7 change in union to pursue a Section 301 claim within six months of decertification. Although the
8 Board suggested that Section 301 suits would be slower and more costly than arbitration, legal
9 scholarship has long questioned this assumption. Moreover, the certification of a rival union and the
10 decertification of an incumbent union create significant upheaval in many respects. Whatever
11 inefficiency might be created by pursuing outstanding grievances in court is far outweighed by the
12 problems that would be created by requiring an employer to deal with two unions simultaneously in
13 violation of Section 9(a) of the Act.

14 Finally, even if the Board were to adopt a new rule requiring arbitration with a decertified and
15 replaced union – and it should not – it would be manifestly unjust to apply such a new rule to
16 Children’s Hospital under the facts of this case. *See Retail, Wholesale & Dep’t Store Union v. NLRB*,
17 466 F.2d 380, 387-393 (D.C. Cir. 1972); *see also United Food & Commercial Workers Int’l Union*,
18 *Local No. 150-A v. NLRB*, 1 F.3d 24, 34-35 (D.C. Cir. 1993). In refusing to arbitrate with SEIU,
19 Children’s Hospital reasonably relied on existing published federal authority holding clearly that it
20 had no duty to arbitrate under the circumstances. *See Unite Here*, 736 F. Supp. 2d. 790 (S.D.N.Y.
21 2010). Further, rather than simply taking refuge in its assertions, Children’s Hospital undertook the
22 expense and effort of affirmatively seeking—and ultimately obtaining—a federal court ruling that it
23 had no duty to arbitrate with SEIU. *See Children’s Hosp. v. SEIU*, 2012 U.S. Dist. LEXIS 147461.
24 Holding Children’s Hospital liable for a ULP based on a newly announced rule that runs contrary to
25 both exclusive-representation principle of Section 9(a) and the express confirmatory ruling of a
26 federal district court would be inequitable and unjust.

II. ARGUMENT

A. The Exclusive-Representation Principle of Section 9(a) of the Act Controls Here and Precludes Arbitration with a Decertified and Replaced Union

Although an employer has a duty to collectively bargain – which includes a duty to arbitrate – with the union representing its employees, as the D.C. Circuit pointed out, that duty is “*subject to* the provisions of section [9(a)] of th[e Act].” *Children’s Hosp. v. NLRB*, 793 F.3d at 57 (quoting 29 U.S.C. § 158(a)(5)) (emphasis added). It is black letter law that the phrase “subject to” means, in this context, “subordinate to” or “governed by.” *MemoryTen, Inc. v. Silicon Mountain Holdings*, 92 F. Supp. 3d 176, 2015 WL 1176172, at *7 (S.D.N.Y. Mar. 16, 2015) (quoting *Black’s Law Dictionary* 1425 (6th ed.1990)). Thus, where a statutory provision is made “‘subject to’ [another] statutory provision, the effect of the [first provision is] controlled and limited by the [other] statute.” *F.D.I.C. v. Ching*, 2015 WL 4530616, at *7 (E.D. Cal. July 27, 2015) (citation omitted).

Section 9(a) of the Act, in turn, *requires* that an employer bargain only with the “exclusive representative” the employees in the unit. As the D.C. Circuit explained:

According to the U.S. Supreme Court, exclusive means exclusive: Once a majority of employees in a bargaining unit chooses a union, section 9(a) imposes on the employer a “negative duty to treat with no other.” *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684, 64 S.Ct. 830, 88 L.Ed. 1007 (1944). This is a consequence of the fact that “[t]he majority-rule concept is today unquestionably at the center of our federal labor policy.” *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967). Obligating an employer to bargain only with the majority union prevents “strife and deadlock” by eliminating rival factions that can make demands on the employer. See *Emporium Capwell Co. v. W. Addition Cmty.* *58 *Org.*, 420 U.S. 50, 68, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975).

Children’s Hosp. v. NLRB, 793 F.3d at 57-58.

Because the duty to bargain and arbitrate under Section 8(a)(5) of the Act is “subject to” the above exclusive-representation principles, as codified in Section 9(a), Section 8(a)(5) cannot be read to require bargaining or arbitration with a decertified union that has been replaced by a new exclusive bargaining representative. Accordingly, here, the Board must hold that Children’s Hospital has no duty to arbitrate with SEIU, a decertified union that had been replaced by a new union, and that Children’s Hospital did not violate the Act by refusing to so arbitrate. Any other result would elevate

1 Section 8(a)(5) over Section 9(a), which would turn the express language of the Act “on its head.”
2 *MemoryTen, Inc.*, 2015 WL 1176172, at *7 (rejecting argument that would “turn the meaning of the
3 phrase ‘subject to’” into “‘notwithstanding’”).

4 No federal court has ever before ordered an employer to arbitrate with a union following its
5 decertification and the certification of a different exclusive bargaining representative. To the
6 contrary, it is well established that when “a union has been decertified . . . it is no longer the
7 representative of the employees, and it cannot become a proper representative of the employees until
8 it re-establishes its majority status.” *Sheet Metal Workers Int’l Ass’n, Local No. 162 v. Jason Mfg.*,
9 900 F.2d 1392, 1400 (9th Cir. 1990). Indeed, the courts have repeatedly stated that requiring an
10 employer to bargain with a decertified union would be tantamount to forcing the employer to commit
11 an unfair labor practice. *Id.*; *McGuire*, 355 F.2d at 358; *Glendale Mfg. Co. v. Local No. 520, ILGW*,
12 283 F.2d 936, 939 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1962); *see also NLRB v. Retail Clerks*
13 *Local 588*, 587 F.2d 984, 986 (9th Cir. 1978).

14 There is no principled basis – and no authority – for the Board to depart from these reasoned
15 decisions. Indeed, the D.C. Circuit unequivocally agreed with Children’s Hospital that the Board’s
16 reliance on an inapposite line of cases involving the “unfinished business” rule – *i.e.*, that an
17 employer is required to arbitrate with a decertified union when there is no replacement union – was
18 misplaced. *Children’s Hosp. v. NLRB*, 793 F.3d at 59 (“[The Board’s O]rder discussed only section
19 8(a) of the Act. None of the precedent it cited dealt with the precise situation here: a decertified
20 union that has been *replaced* by a new union. [] In other words, it relied on cases that did not
21 implicate the exclusivity principle of section 9(a).”) (citation omitted).

22 In contrast to the inapposite case law previously relied on by the Board, Children’s Hospital’s
23 position is supported by (1) the plain language of Section 9(a) of the Act, 29 U.S.C. § 159(a), which
24 mandates that an employer deal “exclusive[ly]” with the certified bargaining representative;
25 (2) seminal Supreme Court decisions confirming that Section 9(a) “exact[s] the negative duty to treat
26 with no [union] other” than the certified one, *Medo Photo Supply Corp.*, 321 U.S. at 683-84 (quoting
27 *Jones & Laughlin Steel Corp.*, 301 U.S. at 44); and (3) at least three decisions of other federal courts

specifically holding that an employer has no duty to arbitrate with a union other than the certified one. See *McGuire*, 355 F.2d at 358; *Unite Here*, 736 F. Supp. 2d. at 792-97; *Children's Hosp. v. SEIU*, 2012 U.S. Dist. LEXIS 147461, at *7-10.

The Second Circuit's decision in *McGuire*¹ squarely holds that an employer has no duty to arbitrate grievances with a union other than the certified bargaining representative because doing so would violate Section 9(a)'s exclusivity mandate. 355 F.2d at 358. There is no way around this conclusion, and the Board cannot plausibly distinguish *McGuire*. The Second Circuit's holding was based on three unassailable propositions, all of which are directly applicable here: (1) "[a]rbitration of grievances is clearly a part of the collective bargaining process"; (2) the "duty of the employer . . . to bargain with the collective bargaining representative of a majority of the employees in the unit . . . exclusively . . . imposes the negative duty to treat with no other"; and, thus, (3) "an order to [the employer] to arbitrate might force [it] to commit an unfair labor practice by bargaining with a minority union when a majority union is in existence." *McGuire*, 355 F.2d at 358 (internal quotes and citations omitted).

Before the D.C. Circuit, the Board also criticized the U.S. District Court for the Northern District of California's prior decision in favor of Children's Hospital in this precise dispute, *Children's Hosp. v. SEIU*, 2012 U.S. Dist. LEXIS 147461, arguing that the District Court did not discuss Board precedent. But the D.C. Circuit has now unequivocally held that Board precedent implicating the unfinished business rule is inapposite in this case. Accordingly, the Northern District of California's decision cannot be faulted for failing to cite such inapposite case law.² To the

¹ In *McGuire*, a local union represented employees of a company whose assets and customer accounts were acquired by a larger employer. 355 F.2d at 354. The acquiring employer then hired many of the former employees of the acquired company. *Id.* at 354-55. In a "clarification" proceeding, the Board ruled that the employees who had been hired were properly part of a unit represented by a labor association that was already representing the acquiring employer's employees, and thus were no longer represented by the local union. *Id.* at 355-56. The local union sought to compel arbitration with the acquiring employer on a number of items that arose under the prior CBA with the acquired company. *Id.* For the reasons discussed herein, the Second Circuit reversed a district court order compelling the acquiring employer to arbitrate with the local union. *Id.* at 356-58.

² The Board's criticism before the D.C. Circuit of the Southern District of New York's decision in *Unite Here*, 736 F. Supp. 2d at 793-96, lacks merit for precisely the same reason.

contrary, the District Court's conclusion that arbitration with SEIU would require unlawful negotiation and bargaining with a decertified and replaced union was consistent with Section 9(a) and prior federal decisions and, therefore, correct. *Children's Hosp. & Research Ctr. Oakland*, 2012 U.S. Dist. LEXIS 147461, at *7-10.

B. Well Established Labor Policy Precludes Compelled Arbitration with a Union Other than the Exclusive Representative

Contrary to the Board's arguments before the D.C. Circuit, there is no legal or rational basis to distinguish between ostensibly permissible "arbitration" with a decertified and replaced union, on the one hand, and impermissible bargaining with such union, on the other hand. The U.S. Supreme Court and the U.S. Courts of Appeals have rejected any such distinction. See *United Steelworkers of America v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 578 (1960) ("[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."); *Children's Hosp. v. NLRB*, 793 F.3d at 57 (quoting *Fournelle v. NLRB*, 670 F.2d 331, 344 (D.C. Cir.1982) ("[A]rbitration is an essential part of the collective bargaining process."); *McGuire*, 355 F.2d at 358 ("Arbitration of grievances is clearly a part of the collective bargaining process....").

Significantly, the Northern District of California explicitly rejected any such distinction *under the facts of this very case*. Addressing the SEIU's argument that "it [could] arbitrate these claims while avoiding any ancillary bargaining or negotiating," the court explained:

To compel arbitration here would necessarily entangle Children's Hospital in bargaining and negotiations related to the arbitration proceeding. Ancillary to arbitration, parties are often required or encouraged to engage in settlement discussions or other kinds of negotiating that requires the exchange of information. [] In this case, the CBA states that arbitration would commence after [SEIU] and Children's Hospital select an "impartial third party to be the Arbitrator and to hear and determine the issues." [] Arbitrator selection would likely require negotiations and agreement between the parties. To negotiate just that one term may expose Children's Hospital to an unfair labor practices charge.

To compel arbitration here would also narrow and constrain the arbitration process and limit the nature of award an arbitrator could issue. For instance, in [*Federation of Union Representatives v. Unite Here*, 736 F. Supp. 2d 790 (S.D.N.Y. 2010)], the arbitral award itself, issued prior to decertification, contemplated that the parties would negotiate its terms. *Unite Here*, 736 F. Supp. 2d at 796 ("Certain aspects of the

1 Award on their face call for prospective negotiations between the union and the
2 employer; for example, the Award requires [the decertified union] to ‘cease and desist
3 from shifting liability for ... automobile insurance reimbursement onto bargaining unit
4 members, until such time as the parties may negotiate otherwise,’ and calls for UH to
5 ‘take whatever remedial steps necessary to implement’ the foregoing order.”). The
6 Court held that such necessary negotiations of the award’s terms would entangle the
7 employer in prohibited bargaining. *Id.* at 796-97. Thus, the Court refused to force the
8 employer to bargain with the decertified union. *Id.*

9
10 In this case, to avoid an unfair labor practices charge, the parties would be required to
11 forego all of the usual ancillary bargaining and negotiating, and the arbitrator’s award
12 would have to be narrowly tailored so as to avoid the need for further negotiations. . . .
13 The Court declines to compel arbitration on the one hand, while tying the parties’
14 hands during that arbitration, on the other.

15
16 *Children’s Hosp. v. SEIU*, 2012 U.S. Dist. LEXIS 147461, at *8-10 (certain citations omitted). The
17 court’s analysis and conclusion above were correct, and the Board should hold likewise.

18 The decisions of other Circuit Courts of Appeals would support such a holding. *See, e.g.,*
19 *Sheet Metal Workers Int’l Ass’n, Local No. 162*, 900 F.2d at 1400 (“If we compel the employer to
20 bargain with the [minority] union under these circumstances, we compel the employer and the union
21 to commit an unfair labor practice in violation of the rights guaranteed to the employees under § 7.”)
22 (internal quotes and citations omitted) (quoting *Glendale*, 283 F.2d at 939); *NLRB. v. Gen. Elec. Co.*,
23 418 F.2d 736, 753-55 (2d Cir. 1969) (recognizing that in every instance in which an employer
24 attempted to negotiate with local unions, rather than the international union that was the exclusive
25 bargaining representative, the employer committed an unfair labor practice and noting that such
26 negotiations “are inherently divisive” and “subvert the cooperation necessary to sustain a responsible
27 and meaningful union leadership.”).

28 The Board’s argument before the D.C. Circuit that arbitration with the decertified and
replaced SEIU would not affect “current conditions of employment for the unit employees” is plainly
incorrect. The processing of the three grievances will involve contract interpretation and application
of contract terms and thus potentially will have prospective impact on employees’ terms and
conditions of employment. One grievance involves resolution of a dispute over contractual language
regarding entitlement to transport pay for respiratory therapists. *See* Joint Statement of Stipulated

1 Facts (“JSSF”) ¶¶ 27-31, NLRB No. 32-CA-086106, June 25, 2013. Similarly, another grievance
2 requires contract interpretation regarding backpay owed when a bid job is awarded erroneously. *See*
3 *id.* ¶¶ 22-26. The third grievance requests reinstatement, which, if ordered, would inevitably affect
4 seniority rights of employees now represented by NUHW. *See id.* ¶¶ 15-21. The prior CBA
5 language at issue in the three grievances is identical to the language in the current Children’s
6 Hospital-NUHW CBA.³ Thus, any settlement or arbitration award that resolves those grievances is
7 likely to be binding – or at least strongly persuasive – with respect to the interpretation and
8 application of the same language in the current CBA.

9 Arbitration settlements and awards under a prior CBA are often treated as precedential, or
10 even controlling, when subsequent disputes arise under similar provisions of a new CBA. *See* Jay E.
11 Grenig, 1-9 Labor And Employment Arbitration § 9.05[1][b] (Matthew Bender & Co., Inc. 2014)
12 (stating that persuasive arbitral precedent depends on whether, *inter alia*, “[t]he contractual
13 provisions in question and each party’s position [are] comparable”); *HBI Automotive Glass*, 97 LA
14 121 (Richard, 1991) (stating that “an award which interprets contractual rights and obligations is
15 conclusive on all subsequent grievances which call for interpretation of the same rights and
16 obligations” and noting the “binding nature of earlier awards determining contractual rights and
17 obligations *when the language of the agreement remains unchanged*”) (emphasis added; internal
18 quotes and citations omitted); *cf. National Distillers & Chem. Corp.*, 85 LA 622 (Caraway, 1985)
19 (arbitrator considered and relied on settlement of similar grievances seeking back pay under similar
20 terms of prior agreements).

21 Further, it is likely that either Children’s Hospital or NUHW will seek to prevent relitigation
22 of the same contract language based on an arbitration decision to which NUHW was not a party.
23 Indeed, nonmutual issue preclusion is a regular feature of both federal and California state law.

24
25 ³ If the three grievances were arbitrated, as requested by SEIU, Sections 5.6, 8.4, 8.5, 9.1, and 30 of
26 the prior CBA would be at issue and would require interpretation and application in the arbitrations.
27 *See* JSSF ¶ 6, Jt. Ex. 1, CBA at 7, 24-26, 28-29, 62. The language contained in these sections is
28 identical to the language contained in the same sections of the Children’s Hospital-NUHW CBA.
(This CBA, which is effective November 6, 2013 – April 30, 2016, is available at
<http://nuhw.org/wp-content/uploads/2014/06/Childrens-Hospital-Oakland-contract.pdf>.)

1 *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971)
2 (permitting nonmutual defensive issue preclusion); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326
3 n.5 (1979) (permitting nonmutual offensive issue preclusion); *Roos v. Red*, 30 Cal. Rptr. 3d 446, 452
4 (Cal. Ct. App. 2005) (“[W]here collateral estoppel is applied ‘offensively’ to preclude a defendant
5 from relitigating an issue the defendant previously litigated and lost, the courts consider whether the
6 party against whom the earlier decision is asserted had a ‘full and fair’ opportunity to litigate the
7 issue.”). Thus, there is a strong likelihood that the outcome of any putative arbitrations between
8 SEIU and Children’s Hospital would affect the interpretation and application of the current CBA with
9 NUHW.

10 Moreover, as in any such dispute, resolution of these grievances may well come by way of
11 negotiation and settlement of the contemplated arbitration. See JSSF ¶ 45, Joint Ex. 11 at p. 7, lines
12 25-28. Such activity would deprive NUHW of its *exclusive* right to negotiate over the issues raised
13 by the grievances and would therefore violate Section 9(a) of the Act. Both Board precedent and
14 federal case law recognize that grievance proceedings frequently, even inherently, require or result in
15 negotiation. See, e.g., *Finley Hosp.*, 359 N.L.R.B. No. 9, slip op. at 8, n.17 (Sept. 28, 2012) (stating
16 that the employer’s failure to provide information to a union about a pending grievance “deprived the
17 Union of the opportunity to investigate the grievance and to negotiate with the Respondent based on
18 the results of the investigation”); *Int’l Ass’n of Machinists & Aerospace Workers of Am., Local Lodge*
19 *S-76*, No. 4-CB-10259, 2009 NLRB LEXIS 279 (Sept. 9, 2009) (noting that grievance discussions
20 ultimately resulted in early negotiations for a successor CBA); *In re: St. Vincent’s Catholic Med.*
21 *Ctrs. of N.Y.*, No. 11 Civ. 9431 (ER), 2012 U.S. Dist. LEXIS 139584 (S.D.N.Y. Sept. 27, 2012)
22 (arbitration proceeding adjourned while the parties attempted to negotiate a settlement of the
23 grievance); *Newman v. Corner Inv. Co., LLC*, No. 2:10-cv-00550, 2012 U.S. Dist. LEXIS 79630 (D.
24 Nev. June 8, 2012) (acknowledging extensive negotiations between the union and employer to settle
25 grievances); *Murray v. City of Columbus*, No. 2:10-cv-00797, 2012 U.S. Dist. LEXIS 48121 (S.D.
26 Ohio Apr. 5, 2012) (same); *Operating Eng’rs’ Pension Trust Fund v. Fife Rock Prods. Co.*, No. C
27 10-00697 SI, 2010 WL 2635782, at *3 (N.D. Cal. June 30, 2010) (noting that ancillary to arbitration,

1 parties are often required or encouraged to engage in settlement discussions or other kinds of
2 negotiating that require the exchange of information).

3 Section 9(a) of the Act simply does not countenance this kind of bargaining with a minority
4 union. The Board should not establish a rule that forces employers to treat with more than one union.

5 **C. Employees Have Other Avenues to Pursue Outstanding Grievances Following**
6 **Union Decertification and Replacement**

7 Holding that Children's Hospital has no duty to arbitrate with SEIU would not foreclose other
8 avenues of relief for employees with grievances that remain outstanding as of the union's
9 decertification and replacement by a new union. At least two such non-exclusive alternative avenues
10 exist: (1) pursuing a ULP charge with the Board; and/or (2) filing a suit pursuant to Section 301 of
11 the Labor Management Relations Act, 29 U.S.C. § 185. *Cephas v. MVM, Inc.*, 520 F.3d 480, 484
12 (D.C. Cir. 2008) ("[A]n employee may sue his employer under § 301 for breach of a CBA even if the
13 employer's alleged conduct is also an unfair labor practice prohibited by the NLRA.") (citing *Smith v.*
14 *Evening News Ass'n*, 371 U.S. 195, 197, 201 (1962)).

15 Employees who have grievances outstanding when the incumbent union is decertified and
16 replaced by another union are free to file ULP charges with the Board seeking relief the same or
17 similar to that sought through their grievances. Indeed, here, one of the grievants subsequently filed a
18 ULP charge on her own behalf alleging wrongful termination, which was fully investigated by NLRB
19 Region 32 before being dismissed, and which dismissal was upheld by the NLRB's General Counsel.
20 See JSSF ¶¶ 18-21.

21 Second, it is well settled that an "individual employee may bring suit against his employer for
22 breach of a collective bargaining agreement" under Section 301 of the LMRA. *Chester v. Wash.*
23 *Metro. Area Transit Auth.*, 335 F. Supp. 2d 57, 64 (D.D.C. 2004) (quoting *DelCostello v. Int'l*
24 *Brotherhood of Teamsters*, 462 U.S. 151, 163, (1983)). Such a claim would simply require alleging
25 the underlying breach of the CBA and "either that his employer's actions effectively repudiated the
26 grievance procedures of the CBA or that his union wrongfully refused to pursue his grievance." *Id.*
27 In a case like this one, the facts would appear to support such pleading. Moreover, under existing

precedent, it appears that any such employee would have at least six months after the date of the incumbent union's decertification to file a Section 301 suit to pursue the claims raised in any unresolved grievance. *See Cephas*, 520 F.3d at 484-90 (discussing application of six-month limitations period in Section 10(b), 29 U.S.C. § 160(b), or longer state law limitations period to Section 301 claims); *Simmons v. Howard Univ.*, 157 F.3d 914, 917 (D.C. Cir. 1998) (noting that limitations period is tolled while plaintiff engages in "good faith attempts to exhaust grievance procedures").

Accordingly, if the Board holds, as it must, that the clear command of Section 9(a) of the Act bars arbitration of grievances with a decertified, replaced union, such a holding would in no way deprive employees of meaningful remedies for unresolved grievances. The Board's asserted concern before the D.C. Circuit that court litigation would be slower and costlier has long been questioned in the legal scholarship.⁴ *See, e.g., D. Bruce Shine & Shelburne Ferguson, Jr., A Survey of Tennessee Labor Cases Since 1954*, 47 TENN. L. REV. 323, 361 (1980) ("Arbitration in the labor field has become increasingly more expensive than litigation before the courts."); Stacia Marie Jones, Note & Comment, *Confidentiality in Discrimination-Related Dispute Mediation: Is There a Congressional Mandate for Union Employees to Have an Individual Right to Pursue Mediation Without Union Representation?*, 15 OHIO ST. J. DISP. RESOL. 483, 486 (2000) ("In a unionized workforce, where arbitration is used on a regular basis, some of the characteristics that plague formal litigation – expensive, slow, formal, and combative – have become characteristics of labor arbitration."). However, even if *arguendo* litigation were marginally slower and more expensive than arbitration, it poses a relatively minor inconvenience in service of more important policies embodied in the Act: that (i) employees remain free to choose a new representative; and (ii) employers deal only with the representative so chosen.

Indeed, the replacement of one union by another inevitably results in significant workplace upheaval – including establishing new relationships and lines of communication between the

⁴Indeed, the SEIU's failure to seek arbitration of two of the three grievances for over six months and a year, respectively, is strong evidence that court litigation, in itself, is unlikely to be the primary cause of any unreasonable delay in resolving outstanding grievances.

1 employer and the new union, and the new union and its unit members; constituting a new bargaining
2 committee; and negotiating an entirely new CBA. Requiring unit members with outstanding
3 grievances to seek redress in court – rather than through arbitration involving the old union – would
4 be only a minor addition to this list. Moreover, nothing would prevent an employer or grievant from
5 seeking to resolve the pending dispute through other channels, including negotiations with the new
6 union.

7 Thus, there is no question that meaningful, viable remedies exist where Section 9(a)'s
8 exclusivity provision renders arbitration impermissible.

9
10 **D. If the Board Were to Establish a New Rule Requiring Arbitration with a**
11 **Decertified and Replaced Union in These Circumstances, It Would Be Manifestly**
12 **Unjust to Hold Children's Hospital Liable for a ULP**

13 Even if the Board adopts a new rule that an employer has a duty to arbitrate with a decertified,
14 replaced union – and it should not -- it would be a manifest injustice to apply that rule retroactively
15 and hold Children's Hospital liable for a ULP under the facts of this case. *United Food &*
16 *Commercial Workers Int'l Union, Local No. 150-A v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993) (quoting
17 *Consol. Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989)); *see also Retail, Wholesale &*
18 *Dep't Store Union v. NLRB*, 466 F.2d 380, 387-393 (D.C. Cir. 1972).

19 All of the hallmarks of those cases in which courts have rejected retroactive application of
20 new rule would be present here. *See United Food & Commercial Workers Int'l Union, Local No.*
21 *150-A*, 1 F.3d at 34-35. First, "the critical question of whether the challenged decision [would]
22 'create[] a new rule, either by overruling past precedents relied upon by the parties or because it was
23 an issue of first impression'" would unequivocally be answered in the affirmative in this case. *See id.*
24 at 34 (citing *District Lodge 64, Int'l Ass'n of Machinists v. NLRB*, 949 F.2d 441, 447 (D.C. Cir.
25 1991)). At the time of the events in question, neither the Board nor any court had ever held that an
26 employer must arbitrate with a decertified union that had been replaced by a newly certified union.
27 Moreover, the federal courts that had addressed the question, or analogous questions, had uniformly
28 held that an employer has no such duty. *See Children's Hosp. v. SEIU*, 2012 U.S. Dist. LEXIS

1 147461; *Unite Here*, 736 F. Supp. 2d. 790 (S.D.N.Y. 2010); *see also McGuire*, 355 F.2d at 358;
2 *Glendale Mfg. Co.*, 283 F.2d at 939.

3 Thus, if the Board issues a new rule requiring Children's Hospital to arbitrate with SEIU, such
4 a rule would depart from precedent or, at the very least, constitute resolution of an issue of first
5 impression before the Board. *United Food & Commercial Workers Int'l Union, Local No. 150-A*, 1
6 F.3d at 34-35. Moreover, because such a rule would ostensibly require arbitration with a union other
7 than the certified one, it would go well beyond merely "fill[ing] a void in an unsettled area of the
8 law." Rather, it would constitute an "abrupt break with [the] well-settled policy" that an employer
9 must "treat with no [union] other" than the exclusive representative. *United Food & Commercial*
10 *Workers Int'l Union, Local No. 150-A*, 1 F.3d at 34 (quoting *Local 900, Int'l Union of Electrical*
11 *Workers v. NLRB*, 727 F.2d 1184, 1195 (D.C. Cir. 1984)); *Retail, Wholesale & Dep't Store Union v.*
12 *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (stating first two prongs of retroactivity test as "(1)
13 whether the particular case is one of first impression, (2) whether the new rule represents an abrupt
14 departure from well established practice or merely attempts to fill a void in an unsettled area of law");
15 *see also Medo Photo Supply Corp.*, 321 U.S. at 683-84.

16 In similar circumstances, the D.C. Circuit has held that retroactive application of a new
17 adjudicatory rule is inappropriate, and has declined enforcement on that basis. *See Retail, Wholesale*
18 *& Dep't Store Union*, 466 F.2d at 391-93. In that case, the D.C. Circuit denied enforcement "where
19 the Board had confronted the problem before, had established an explicit standard of conduct, and
20 now attempts to punish conformity to that standard under a new standard subsequently adopted." *Id.*
21 Similarly, here, the federal courts had "confronted the problem before [and] had established an
22 explicit standard of conduct." If the Board were now to hold Children's Hospital liable for a ULP, it
23 would constitute an impermissible "attempt[] to punish [Children's Hospital's] conformity to that
24 standard under a new standard subsequently adopted." *See id.*

25 Second, any ULP finding would result in a "manifest injustice" in light of the efforts on the
26 part of Children's Hospital following SEIU's arbitration demand on the eve of decertification.
27 *Consol. Freightways*, 892 F.2d at 1058. Instead of ignoring SEIU, or simply asserting its refusal to
28

1 arbitrate on the basis of the clear holding in *Unite Here*, Children’s Hospital forthrightly undertook
2 the effort and expense of affirmatively seeking a federal court declaration regarding its obligations to
3 SEIU. Following full and fair litigation of the issues, the U.S. District Court for the Northern District
4 of California held, based on the authority discussed *supra.*, that Children’s Hospital had no duty to
5 arbitrate with SEIU. *Children’s Hosp. & Research Ctr. of Oakland, Inc.*, 2012 U.S. Dist. LEXIS
6 147461. Faced with a clear court ruling and the possibility of another ULP charge for arbitrating
7 with a union other than the certified NUHW, Children’s Hospital was entitled—indeed, required—to
8 decline arbitration with SEIU. *See Retail, Wholesale & Dep’t Store Union*, 466 F.2d at 390 (stating
9 third and fourth prongs of retroactivity test as “the extent to which the party against whom the new
10 rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order
11 imposes on a party”).

12 Finally, this case presents no overriding “statutory interest in applying a new rule despite the
13 reliance of [Children’s Hospital] on the [existing] standard.” *Retail, Wholesale & Dep’t Store Union*,
14 466 F.2d at 390 (reciting fifth and final prong of retroactivity test). To the contrary, as discussed at
15 length above, the controlling statute here, Section 9(a) of the Act, prohibits an employer from
16 arbitrating with a union other than the exclusive bargaining representative. 29 U.S.C. § 159(a). The
17 statute contains no exception for grievances that remain outstanding at the time the prior union is
18 decertified and a new union takes its place, and there is no authority that limits or qualifies the
19 express command of Section 9(a), and of the Supreme Court, that Children’s Hospital shall “treat
20 with no [union] other” than the exclusive bargaining agent, NUHW. Since the ULP provision at
21 issue, Section 8(a)(5), is expressly subject to that command, there can be no ULP finding here,
22 irrespective of the rule the Board chooses.

1 **III. CONCLUSION**

2 Petitioner Children's Hospital respectfully requests that the Board (i) adopt the unanimous
3 position of the federal courts that Section 9(a) of the Act controls and precludes Children's Hospital
4 from arbitrating with SEIU, which has been decertified and replaced by another exclusive bargaining
5 representative; and (ii) hold that Children's Hospital did not commit any ULP and dismiss all such
6 charges against it.

7
8 DATED: October 15, 2015

Respectfully submitted,

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9
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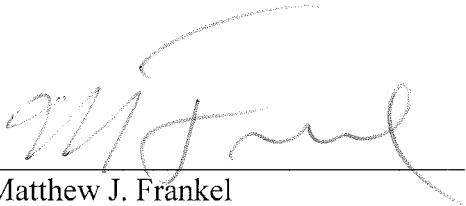
16 4827-1402-3209.3

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2015, a copy of the Respondent's Statement of Position Following Remand from D.C. Circuit Court of Appeals has been sent via electronic mail to the following parties in this matter:

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